83-2107

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

IN RE:

JUDITH LYNN MADRID.

Debtor,

_____/

JUDITH LYNN MADRID,

Petitioner,

v.

LAWYERS TITLE INSURANCE CORP.
and DONALD TUPNEY,

Appellees.

_____/

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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43 pp

QUESTION PRESENTED FOR REVIEW

IS THE FORECLOSURE OF A DEED OF TRUST AND THE SALE OF PROPERTY SUBJECT TO THE LIEN WITHIN ONE YEAR OF THE FILING OF A PETITION IN BANKRUPTCY A "TRANSFER" UNDER THE PROVISIONS OF 11 U.S.C. §101(41) AND 11 U.S.C. §548(d)(1)

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IN THE SUPREME COURT OF THE UNITED STATES

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IN RE:

JUDITH LYNN MADRID,

Debtor,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITEDSTATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JUDITH LYNN MADRID,

Petitioner,

v.

LAWYERS TITLE INSURANCE CORP. and DONALD TURNEY,

Appellees.

_____/

Petitioner, Judith Lynn Madrid hereby petitions that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered February 13, 1984.

OPINION BELOW

The United States Bankruptcy Court opinion is reported at 10 B.R. 795 (BKRTCY. D. Nevada 1981) and is appended at App. A-32. The opinion of the United States Bankruptcy Appellate Panel is reported at 21 B.R. 424 (B.A.P. 9th Cir. 1982) and is appended at A-19. The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is appended at APp. A-1.

JURISDICTION

This United States Court of Appeals for the Ninth Circuit entered judgment in the above-entitled cause of action on February 13, 1984. This Petition seeking determination and relief as provided in 28 U.S.C. Sec. 2106 is filed within ninety (90) days of the entry of the judgement in accordance with 28 U.S.C. Sec. 1254(1) and 28 U.S.C. Sec.

2102(c). The jurisdiction of this Court is conferred by 28 U.S.C. Sec. 1254 (1) to review an order or judgment of the United States Court of Appeals for the Ninth Circuit.

STATUTES INVOLVED

A. FEDERAL BANKRUPTCY STATUTES.

11 U.S.C. Sec. 101 DEFINITIONS

(41) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest. Pub.L.95-598, Nov. 6, 1978, 92 Stat. 2549; Pub.L. 97-222, § 1, July 27, 1982, 96 Stat. 235.

§ 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor i property, or any obligation incurred by the debtor, that was made or

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incurred on or within one year before the date of the filing of the petition, if the debtor-

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted; or

(2) received less than a reasonable equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the

debtor in property, or any obligation incurred by the debtor, that was made or incurred within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on any interest transferred, may retain any lien transferred, or may enforce any obligation incurred, and the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the

commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

(2) In this section-

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor; and

(B) a commodity broker, forward contract merchant, stockbroker, or securities clearing agency that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, takes for value to the extent of such payment. Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2600; Pub.L. 97-222, § 5, July 27, 1982, 96 Stat. 236.

§ 550. Liability of transferee of avoided transfer

(a) except as otherwise provide in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from-

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of-

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by such transferee from such property; and

(B) any increase in value as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes-

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien against such property;

(E) discharge of any lien against such property that is superior or equal to the rights of the trustee; and

(F) preservation of such property;

(e) An action or proceeding under this section may not be commenced after the earlier of-

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; and

(2) the time the case is closed or dismissed.
Pub.L. 95-598, Nov. 6, 1978, 92 Stat.2601

B. NEVADA REVISED STATUTES

21.130 Notice of sale under execution. Before the sale of property on execution, notice thereof shall be given as follows:

(1) Perishable property. In cases of perishable property, by posting written notice of the time and place of sale in 3 public

places at the township or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property.

(2) Other personal property. In case of other personal property, by posting a similar notice in 3 public places of the township or city where the sale is to take place, not less than 5 nor more than 10 days before sale, and, in case of sale on execution issuing out of a district court, by the publication of a copy of the notice in a newspaper, if there by one in the court, at least twice, the first publication being not less than 10 days before date of sale.

(3) Real property. In case of real property, by personal service upon each judgment debtor or by registered mail to the last-known address of each judgment debtor and by posting a similar notice particularly describing the property, for 20 days successively, in 3 public places of township or city where the property is situated and also where the property is to be sold; and al[illegible]y publishing a copy of the notice three, times, once a week, for 3 successive weeks, in a newspaper, if there be one in the county. The cost of publication shall in no case exceed the rate for legal advertising as provided in NRS 238.070. In any

case where the paper authorized by this section to publish such notice of sale neglects or refuses from any cause to make such publication, then the posting of notices as provided in this section shall be deemed sufficient notice. Notices of the sale of property on execution upon a judgment for any sum less that $500, exclusive of costs, shall be given only by posting in 3 public places in the county, 1 of which shall be posted at the courthouse.
(1911 CPA § 348; A 1951, 153)-(NRS A 1965, 612; 1975, 651)

STANDARDS FOR CONDUCTING FORECLOSURE SALES: DEFICIENCY JUDGMENTS

40.451 "Indebtedness" defined. As used in N.R.S. 40.453 to 40.459, inclusive,"indebtedness" means the principal balance of the obligation secured by a mortgage or deed of trust, together with all interest accrued and unpaid prior to the time of sale, all costs and fees of such foreclosure sale, all advances made with respect to the property by the beneficiary, and all other amounts secured by the mortgage or deed of trust or which constitute a lien on the real property in favor of the person seeking the deficiency judgment. Such amount constituting a lien is limited to the amount of the consideration paid by lienholder.
(Added to NRS by 1969, 572)

40.453 Waiver of rights in documents relating to real property sales against public policy, unenforceable.

1. It is hereby declared by the legislature to be against public policy for any document relating to the sale of real property to contain any provision whereby a mortgagor or trustor waives any rights secured to him by the laws of this state.

2. No court shall enforce any such provision.
(Added to NRS by 1969, 573; A 1973, 911)

40.455 Deficiency judgment: Award to judgment creditor, beneficiary of deed of trust within 3 months from the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080, respectively, an after the hearing conducted under NRS 40.457, the court may award a deficiency judgment to the judgment creditor of the beneficiary of the deed of trust if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of sale proceeds and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively. (Added to NRS by 1969, 573; A 1979, 450)

40.457 Hearing prior to

award of deficiency judgment; appraisal of property sold.

1. Before awarding a deficiency judgment under NRS 40.455, the court shall hold a hearing and shall take evidence presented by either party concerning the fair market value of the property sold as of the date of foreclosure sale or trustee's sale. Notice of such hearing shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for hearing.

2. Upon application of any party made at least 10 days before the date set for the hearing the court shall, or upon its own motion the court may, appoint an appraiser to appraise the property sold as of the date of foreclosure sale or trustee's sale. SUch appraiser shall file with the clerk his appraisal, which is admissible in evidence. The appraiser shall take an oath that he has truly, honestly and impartially appraised the property to the best of his knowledge and ability. Any appraiser so appointed may be called and examined as a witness by any party or by the court. The court shall fix a reasonable compensation for the appraiser, but his fee shall not exceed similar fees for similar services in the

county where the encumbered land is situated.
(Added to NRS by 1969, 573)

40.459 Limitations on amount of money judgment. After the hearing under NRS 40.457, the court may award a money judgment against the defendant defendants personally liable for the debt. The court shall not render judgment for more than the amount by which the amount of indebtedness which was secured by the mortgage, deed of trust or other lien at the time of the foreclosure sale or trustee's sale, as the case may be, exceeded the fair market value of the property sold at the time of such sale, with interest from the date of such sale. In no event shall the court award such judgment, exclusive of interest after the date of such sale, in an amount exceeding the difference between the amount for which the property was actually sold at the foreclosure sale or trustee's sale and the amount of indebtedness which was secured by the mortgage, deed of trust or other lien at the time of such sale.
(Added to NRS by 1969, 573)

107.080 Trustee's power of sale: Notice of default and election to sell; deficiency in performance, payment; place of sale; no equity, right of redemption; shares of cooperative housing corporation.

1. Where any transfer in trust of any estate in real property is made after March 29, 1927, to secure the performance of an obligation or the payment of any debt, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation, for which such transfer is security.

2. The power of sale must not be exercised, however, until:

(a) In the case of any trust agreement coming into force on or after July 1, 1947, and before July 1, 1957, the grantor has for a period of 15 days, computed as prescribed in subsection 3, failed to make good his deficiency in performance or payment, and, in the case of any trust agreement coming into force on or after July 1, 1957 the grantor has for a period of 35 days, computed as prescribed in subsection 3, failed to make good his deficiency in performance or payment; and

(b) The beneficiary, the successor in interest of the beneficiary or the trustee shall first execute and cause to be recorded in the office of the recorder of the county wherein the trust property, or some part thereof, is situated a notice of such breach of his election to sell

or cause to be sold such property to satisfy the obligation; and

(c) Not less than 3 months have elapsed after the recording of such notice.

3. The 15- or 35-day period provided in paragraph (a) of subsection 2 commences on the first day following the day upon which the notice of default and election to sell is recorded in the office of the county recorder of the county in which the property is located and a copy of the notice of default and election to sell is mailed by certified mail with postage prepaid to the grantor or his successor in interest if known, otherwise to the address of the trust property. Such notice of default and election to sell must describe the deficiency in performance or payment and may contain a notice of intent to declare the entire unpaid balance due and payable if acceleration is permitted by the obligation secured by the deed of trust, but acceleration must not occur if the deficiency in performance or payment is made good and any costs, fees and expenses incident to the preparation or recordation of such notice and incident to the making good of the deficiency in performance or payment are paid within the time specified in subsection 2.

4. The trustee, or other person authorized to make the sale under the terms of the trust deed or transfer in trust, shall, after expiration of the 3-month period following the recording of notice of breach and election to sell, and prior to the making of such sale, give notice of the time and place thereof in the manner and for a time not less than that required by law for the sale or sales of real property upon execution. The sale itself may be made at the office of the trustee, if the notice so provided, whether the property so conveyed in trust is located within the same county as the office of the trustee or not.

5. Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the title of the grantor without equity or right of redemption. The sale of a lease of a dwelling unit of a cooperative housing corporation vests in the purchaser title to the shares in the corporation which accompany the lease.
(Pat 1:173:1927; A 1949, 70; 1943 NCL §7710) - (NRS A 1957, 631; 1959, 10; 1061, 23; 1965, 611, 1242; 1967, 198; 1979, 708)

STATEMENT OF THE NATURE CASE

In September , 1979, Petitioner

purchased a residence at 1528 Debra Lane, Incline Village, Nevada from George G. Saure-Pulver Co. for the purchase price of $290,000.00. Petitioner paid $125,000.00 as a down payment to the Seller and executed a note secured by a deed of trust for the balance of $165,000.00. The $125,000.00 down payment was financed through Del Mar Commerce Company and was secured by a second deed of trust on the subject property. Respondent Lawyers Title Insurance Co., is the substituted trustee under this deed of trust.

Petitioner made improvements on the subject proeprty and by June 19, 1980 had reduced the principal amount owing on the second deed of $75,300.00.

Petitioner subsequently defaulted on the second deed of trust. After Notice of Default and Election to Sell and of Notice of Time of Place and Sell, pursuant

to Nevada State Law, Nev. Rev. Stat. Sec. 107.080 and 21.120 (1979), the property was sold at a trustee's sale by the Trustee under the second trust deed on January 9, 1981 to Respondent, Donald Turney. At the time of the sell, approximately $176,000.00 was due on the first trust deed and approximately $80,200.00 was due on the second trust deed. Turney paid the amount owing on the second trust deed plus one dollar.

Petitioner filed her petition under chapter 11 of Title 11 of the U.S. Bankruptcy Code on January 16, 1981.

The parties stipulated that Petitioner was rendered insolvent as a result of the sale. The Bankruptcy Court held that the foreclosure sale was voidable pursuant to 11 U.S.C. §548(a)(2). The Bankruptcy Appelate Panel for the Ninth Circuit reversed onthe grounds that

a non-collusive public sale is as a matter of law for the reasonably equivalent value of the property. The United States Court of Appeals for the Ninth Circuit affirmed the Bankruptcy Appellate Panel on different grounds, holding that under 11 U.S.C. §548(a)(2), the transfer of all interest of the Petitioner in the subject property occurred at the time of perfection of Petitioner;s second deed of trust.

Jurisdiction over the subject matter of this case exists and continues to exist in the United States Bankruptcy Court for the District of Nevada, pursuant to 11 U.S.C. §1471 and 1334, and the Emergency Rule issued by the United States Court of Appeals for the Ninth Circuit, adopted as Local Rule 118 of the Local Rules of Practice for the United States District Court, District of Nevada.

REASON FOR GRANTING THE WRIT

I. THIS CASE SHOULD BE REVIEWED BECAUSE OF THE CONFLICT IN THE CIRCUIT COURTS ON THE ISSUE OF WHETHER A TRUSTEE'S SALE IS A "TRANSFER" UNDER THE BANKRUPTCY CODE, AND BECAUSE THIS ISSUE IS IMPORTANT TO THE PROPER ADMINISTRATION AND APPLICATION OF THE BANKRUPTCY LAWS

A transfer is broadly defined at 11 U.S.C. §101(40) of the Bankruptcy Reform Act of 1978, (hereinafter the Code) as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an interest in property...(emphasis added)." This definition is at lwast as broad as under the former Bankruptcy Act, 2 Collier on Bankruptcy §101.41 (15th ed. 1981). In Re Madrid, 21 B.R. 424 (9th Cir. App. Pan. 1981) Volin B. J. dissenting. The former definition under §1 of the Act, 11 U.S.C. §1(30), defined a "transfer" as including:

> The sale and every other and different mode, direct or indirect, of disposing of as of partin with property or an interest therein or with the possession thereof...voluntarily or involuntarily, by or without judicial proceedings ...11 U.S.C. §1(30).

The breadth of the definition of a transfer under the Bankruptcy Code, 11 U.S.C. §101(41) (supp. IV 1980) is made clear by the House Report stating the following:

> A transfer is a disposition of an interest in property. The definition of transfer is as broad as possible. Many of the potentially limiting words in current law are deleted, and the language is simplified...Under this definition, any transfer of an interest in property is a transfer, including a transfer of possession, custody or control even if there is no transfer of title, because because possession, custody, and control are interests in property. H.R. Rep.No. 595, 95th Cong., 1st Sess. 314 (1977).

In the case of Durrett v. Washington National Insurance Co., 621

F.2d 201 (5th Cir. 1980), the United States Court of Appeals for the Fifth Circuit held that a non-judicial sale of real property under a deed of trust is a transfer within the meaning of §67(d) of the former Bankruptcy Act. The Fifth Circuit Court of Appeals specifically quoted from 1 Collier on Bankruptcy, §1.30 (14th ed. 1977) to note that the definition of "transfer" under the Bankruptcy Act "covers not only alienations of title but includes surrender of possession".

The United States Court of Appeals for the Fifth Circuit followed the Durrett, supra, decision in the per curiam opinion of that court in Abramson v. Lakewood Bank and Trust Co., F.2d 547 (5th Cir. 1981) cert. denial 454 U.S. 1164 (1982). The following Bankruptcy Courts have followed the Durrett decision and its

ineluctable conclusion as to the letter and the spirit of the law under 11 U.S.C. §548 of the Bankruptcy Code. Berge v. Sweet (In re Berge), 33 Bankr. 642 (Bankr. W.D. Wis. 1983); In re Ewing, 112 Bankr. L. Rep. (CCH) ¶69,460 (Bankr. W. D. Pa. Sept. 19, 1983); Bates v. Two Rivers Constr. (In Re Bates), 32 Bankr. 50 (Bankr. E.D. Cal. 1983); Richard v. Tempest, (In re Richard), 26 Bankr. 560 (Bankr. D.R.I. 1983); In re Richardson, 23 Bankr. 434 (Bankr. D. Utah 1983); Perdido Bay Country Club Estates, Inc. v. Equitable Trust Co. (In re Perdido Bay Country Club Estates, Inc.), 23 Bankr. 36 (Bankr. S.D. Fla. 1982); Coleman v. Home Sav. Ass'n. (In re Coleman, 21 Bankr. 832 (Bankr. S. D. Tex. 1982); Smith v. American Consumer Fin. Corp., (In re Georgia Mae Smith), 21 Bankr. 345 (Bankr. M.D. Fla. 1982); Cooper v. Smith (In re

Connie Dale Smith), 24 Bankr. 19 (Bankr. W. D. N. C. 1982); Home Life Ins. Co. v. Jones (In re Jones), 20 Bankr. 988 (Bankr.E.D. Pa. 1982); Wickham v. United Am. Bank (In re Thompson), 18 Bankr. 67 (Bankr. E.D. Tenn. 1982); Marshall v. Spindale Sav. & Loan Ass'n (In re Marshall), 15 Bankr. 738 (Bankr. W.D.N.C. 1982).

Durrett, supra, has been referred to as the first case in which a bankruptcy court has held void, as a fraudulent transfer, a foreclosure sale of real property valid under state law, because the sale occurred within one year of the filing of the petition in bankruptcy. See Abramson v. Lakewood Bank and Trust Co., 647 F.2d 547, 550 (5th Cir. 1981) dissenting opinion of Clark C. J. Nonetheless, it is clearly not the first case where involuntary transfers from a

judicial or sheriff's sale or court order have been found to be "transfers" under bankruptcy law. See Adler v. Greenfield, 88 F.2d 955 (2nd Cir. 1936); Wolf v. Aero Factors Corp., 126 F. Supp. 872 (S.D.N.Y. 1954); Britt v. Damson, 334 F.2d 894 (9th Cir. 1964); Lefkowitz v. Finkelstein Trading Corp., 14 F. Supp. 898 (S.D.N.Y. 1936). Indeed, an early treatise on this subject noted that foreclosures of mortgages and execution upon judicial liens may constitute a fraudulent conveyance. I Glenn, Fraudulent Conveyances and Preferences, Sections 214 a and 214 b (1940). See also, Johnson v. Waters, 111 U.S. 640, 4 S. Ct. 619, 28 L.Ed. 547 (1884).

In Adler v. Greenfield, supra, the Second Circuit Court of Appeals held that a judicial sale of drugstore fixtures after a default judgment was a transfer

and voidable as a preference. The Ninth Circuit held in Britt v. Damson, supra, that a Washington divorce court judgment may be a fraudulent conveyance depending upon whether the Debtor, the former husband of the Defendant, was deprived of a possessory interest in property, and reversed a summary judgment for the former wife.

It is submitted that the holding of the U.S. Court of Appeals for the Ninth Circuit in this case is an improper interpretation of the specific language of 11 U.S.C. §548(d) by the fusion of two separate transfers which are, of course, the initial transfer of the lien or trust deed and the subsequent transfer of the Debtor's right to possession and equity. See, In Re Madrid, 21 B.R. 424, 428 (Volenn, B.J. dissenting); Gillman v. Preston Family Investment Co., (In Re

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Richardson) 23 B.R. 434 (Bkrtcy D. Utah 1982). Under Nevada law a mortgagor under a mortgage[1] or a trustor under a deed of trust[2] retains the right of possession until consumation of a foreclosure sale.

As stated by the Bankruptcy Court in the case of In re Richardson, supra,:

> Under §548(d)(1), a transfer challenged under §548(a) is made when it "becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition." In this case, §548(d)
>
> (1) deems the transfer of the debtors' equity to Preston to have been made when it was so far perfected that a bona fide purchaser from the debtors' could not acquire an interest in the debtor's equity superior to Preston's interest.

> Under Utah law the transfer to Preston was so far perfected that a subsequent purchaser from the debtor could not acquire an interest in the debtors' equity superior to Preston's interest after the sale, when a purchaser, based on the notice of default and the notice of sale, could have discovered the sale. Thus, the transfer was made within one year before the date of the filing of the debtors' petition. (emphasis added) id. at 445.

The Durrett rule, which recognizes that a bona fide purchaser can obtain the right to possession and equity until the time of the foreclosure sale or, at least, until notice of default under state law, see Nev. Rev. Stat. 107.080, is clearly correct. The Ninth Circuit Court of Appeals in this case relied upon its decision in Glessner v. Massey - Ferguson, Inc., 353, F.2d 986 (9th Cir. 1965), cert.denial 384 U.S. 970 (1966) in holding that a foreclosure sale is not a transfer. Glessner v. Massey-Ferguson,

supra, was an action brought to set aside a repossession of equipment as a preference under §60(a)(2) of the former Bankruptcy Act which provided a judgment lien creditor test to determine the time of perfection of a transfer. See, 11 U.S.C. §547(e)(1)(B); 4 Collier on Bankruptcy §547.46 (15th ed. 1983).

The holding of the Ninth Circuit Court in this case ignores the fundamental distinction between the rights obtainable by a bona fide purchaser as compared to a judgment lien creditor in determining the time of perfection of a transfer. Kennedy, Secured Creditor Under The Bankruptcy Reform Act, 15 Indiana L. Rev. 477, 484 (1982). A bona fide purchaser can acquire certain rights superior to a mortgagee or a beneficiary under a trust deed prior to foreclosure, including the mortgagor's or trustor's

right to possession and equity.

This distinction in regard to §60 (a), concerning preferences, and §67(d), concerning fraudulent transfers, under the former Act was intended by Congress and is retained in the current Code. As noted in 4 Colliers on Bankruptcy, Section 548.08 (15th ed. 1981):

> In consequence the provisions for determining the time limitations applicable to preferential transfers in former Sections 3b and 60 became quite distinct from those prescribing the time limitations for fraudulent transfers under former Sections 3b and 67d...
>
> Former Section 67d(5) fixed the time when a transfer was deemed to have been made in computing the applicable limitation in former Section 57d. The time did not start to run until the transfer had been so far perfected that no bona fide purchaser from the debtor could thereafter acquire <u>any rights superior to those of the transferee in the property</u>. That is to say, when the parties to the transfer have done

> everything in the way of recording or giving and taking in possession or otherwise fulfilling the requirements to state law for the transfer to be good against bona fide purchasers persons dealing subsequently with the transferor, then it was deemed to be made for the purposes of commencing to compute time under former Section 67d. (emphasis added).

The holding of the Ninth Circuit in this case is irreconciliable with the definition of a "transfer" under 11 U.S.C. §101(40) including all dispositions of property, whether voluntary or involuntary and that a change of possession is a transfer.

At issue in this case is the role of a federal courts in the interpretation of bankruptcy law. As noted by this Court in Central Trust Company v. Official Creditors Committee of Geiger Enterprises, Inc., 454 U.S. 354, 359, 360, 364, 70 L.E.d. 2d 542, 548, 102 S. Ct. 695 (1982).

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms". Caminetti v.United States, 242 US 470, 485, 61 L. Ed 442, 37 S Ct. 192 (1917). While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress.

Moreover, the decision of the Ninth Circuit in this case concerning an important question of federal law fails to consider the fundamental policies of the very laws in question. As noted by this Court in Sampson v. Imperial Paper and Color Corp., 313 U.S. 215, 219 (1941), "the theme of the Bankruptcy Act is equality of distribution." This purpose applies to the avoiding powers of a trustee as well. See A Survey of the

Fraudulent Conveyance in Bankruptcy, 17 Vanderbilt L. Rev. 381 (1964). Obviously, this policy is frustrated by foreclosure sales which often times result in a sale at an inadequate price depriving the debtor of his equity in the property. Washburn, the Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 So. Cal. L. Rev. 843, 850 (1980).

The policy favoring distribution to all creditors is, of course, most pronounced and effectuated in a reorganization proceeding. See United States v. Whiting Pools, 103 S. Ct. 2309 (1983). The Durrett rule would clearly enhance the likelihood of successful reorganizations by the Debtor regaining his equity in the property. The Durrett decision is in accordance with well-established principles of law concerning

fraudulent transfers as applied to the constructive fraud provisions of 11 U.S.C. §548(a)(2). Moreover, the Durrett rule "is properly sensitive to the policy underlying §548 that the debtor not alienate its equity in its property for less than reasonably equivalent value". Alden, Gross and Borowitz, Real Property Foreclosure as a Fraudulent Conveyance, 38 Bus. Law. 1605, 1610 (1983).

CONCLUSION

In the interests of assuring effective enforcement and application of the federal bankruptcy laws, and in the insurance of even-handed administration of justice in furtherance of the primary purposes of bankruptcy legislation, the Petitioner respectfully requests that this Court grant Petitioner's Petition for a Writ of Certiorari and set this case for full argument.

Respectfully Submitted:

MILLER & DAAR

By: _____
VERNON E. LEVERTY, ESQ.

By: _____
VICTOR M. PERRI, ESQ.

CERTIFICATE OF MAILING

I am an employee of the law firm of Miller & Daar of 832 Willow Street, Reno, Nevada 89502. On the date below written I served the within documents by placing a true copy thereof in the United States mail with postage thereon fully prepaid in the mail at Reno, Nevada addressed as follows:

Timothy J. Henderson, Esq.
Henderson, Nelson & Moschetti
164 Hubbard Way, Suite B
Reno, Nevada 89502

Executed this 20th day of June, 1984.

I declare under penalty of perjury that the foregoing is true and correct.

_____
EVELYN S. BORBE

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[1] Fair v. Howard, 6 Nev. 304 (1871); Bordon v. Clow, 21 Nev. 275 30P. 821 (1892), cited Crumbaker v. Kelly, 95 Nev. 743, 745, 601 P.2d 1199 (1979).

[2] This rule as to trust deeds is the rule in California, see Sacramento Bank v. Alcon 53 P. 813, 121 Cal. 379 (Calif. 1898); Osborne, Nelson and Whitman, Real Estate Financing Law, §4.2 P.120 n. 27 (est ed. 1979) and cases cited therein. Nevada law is assured by the same. See Golden v. Tomiyasu, 387 P.2d 889, 996, 997 (Nevada 1963). See also, McMillan v. United Mortgage Co., 412 P.2d 604 (Nev. 1966); Keever v. Nicholas Beers Co., 611 P.2d 1079 (Nev. 1980) following California interpretation of one action rule.